Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In the

Supreme Court of the United States

October Term, 1994

UNITED STATES OF AMERICA,

Respondent,

vs.

ANTOINE YOUSSEF EL HANI,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erroneously concluded that Petitioner's 1987 conviction for Use of a Communication Facility to Facilitate a Drug Offense constituted a "felony drug offense" within the meaning of 21 U.S.C. § 841(b)(1)(A) which mandates a twenty year mandatory minimum period of incarceration on the instant offense?

2. Whether the improper admission of evidence of Petitioner's 1987 conviction for Use of a Communication Facility to Facilitate a Drug Offense was unduly prejudicial?

3. Whether the prosecutor's improper conduct during his closing argument deprived Petitioner of his constitutional right to a fair trial?

4. Whether the application of the United States Sentencing Guidelines was improper because it calculated the base offense level based on the quantity of drugs sold by Petitioner's codefendants?

In light of the foregoing unresolved legal issues, Petitioner, ANTOINE EL HANI, respectfully requests that the Court grant a writ of certiorari to review the opinion and judgment of the United States Court of Appeals in United States of America v. Antoine Youssef El Hani, 37 F.3d 1280 (8th Cir. October 7, 1994).

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UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Opinion of the Court of Appeals, appended here, is reported at 37 F.3d 1280. The jury verdict and judgment of the trial court is unreported.

JURISDICTION

Jurisdiction for discretionary review by this Court is invoked pursuant to Title 28, United States Code, Section 1254.

The decision sought to be reviewed is that of the United States Court of Appeals for the Eighth Circuit, dated October 7, 1994, a copy of which is included in the appendix of this Petition.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE

This case involves the application of United States statutes, which are set out, in pertinent part, as follows:

TITLE 21, UNITED STATES CODE SECTION 841

> (a) Unlawful acts. Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally –
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance. . . .
>
> (b) Penalties. Except as otherwise provided in section 418, 419, or 420 [21 USCS § 859, 860, or 861], any person who violates subsection (a) of this section shall be sentenced as follows. . . .
>
> (1)(A) In the case of a violation of subsection (a) of this section involving–
>
> (i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin. . . .
>
> If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine

not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $ 8,000,000 if the defendant is an individual or $ 20,000,000 if the defendant is other than an individual, or both. . . . For purposes of this subparagraph, the term "felony drug offense" means an offense that is a felony under any provision of this title or any other Federal law that prohibits or restricts conduct relating to narcotic drugs, marihuana, or depressant or stimulant substances or a felony under any law of a State or a foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, or depressant or stimulant substances. . . .

TITLE 21, UNITED STATES CODE SECTION 843

(b) Communication facility. It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this title or title III. Each separate use of a communication facility shall be a separate offense under this subsection. For purposes of this subsection, the term "communication facility" means any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes mail, telephone, wire, radio, and all other means of communication.

STATEMENT OF THE CASE

A. Overview of the Case

Antoine Youssef El Hani, Petitioner herein, was indicted on March 3, 1993 for the offenses of Aiding and Abetting the Distribution of in Excess of One Kilogram of Heroin[1] and Conspiracy to Possess With Intent to Distribute in Excess of One Kilogram of Heroin[2]. Petitioner pleaded not guilty and the matter proceeded to trial. On March 11, 1993 Petitioner was convicted of both offenses. On September 13, 1993 sentence was imposed on Petitioner and included a period of incarceration of 240 months. Petitioner appealed both his conviction and his sentence to the United States Court of Appeals for the Eighth Circuit, however the court affirmed both his conviction and sentence. Petitioner now petitions for a Writ of Certiorari.

For purposes of brevity, only those facts that are relevant to the issues raised in this petition will be summarized.

B. The Evidence of Petitioner's Previous Conviction

Rick George, a relative of Petitioner's, was called as a trial witness for the government. During cross-examination of this witness Mr. George was asked if he either knew or believed Petitioner to be a drug dealer. He responded that he did not. Then, in further elaborating his response he stated: "Everything I knew with Tony, he had been going to his PO every week, and, I mean, I've seen him with his daughter, a real family man. I didn't know nothing about it." Trial Transcript, Vol. II, pp. 24-25. The witness' statement was clearly support for his proposition that

---

[1] 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2.

[2] 21 U.S.C. § 846.

Petitioner is a responsible person, and that the witness was not aware of alleged drug dealing.

After this testimony a bench conference was held at which the prosecutor requested permission to ask the witness about Petitioner's prior conviction for Use of a Communication Facility to Facilitate a Drug Offense[3] -- a request that was granted over the vigorous objections of Petitioner's trial counsel. Trial Transcript, Vol. II, pp. 27-29.

C. The Prosecutor's Closing Argument

During his closing argument the prosecutor grossly mischaracterized facts in evidence not only once, not twice, but three times. Trial Transcript, Vol. II, pp. 45-46, 49-51. Each time Petitioner's trial counsel objected to the statement and requested a mistrial, and each time the trial court denied the request. The trial court merely told the jury that the facts they are to base their decision should be the facts that they recall from the testimony, not from the prosecutor's argument. After the final incident of mischaracterizing the facts the trial court also "suggested" to the prosecutor that he try to keep his closing argument allegations "very close" to the evidence that was introduced. Trial Transcript, Vol. II, pp. 50-51.

D. The Sentencing Errors

In the sentencing phase of this case there were two errors which are a basis for this petition. First, the trial court determined that for purposes of the United States Sentencing Guidelines, the base offense level should reflect not just the quantity of drugs that Petitioner was alleged to have sold, but also the amount of drugs alleged to have been sold by all of his codefendants. Then, the trial court ruled that Petitioner's past conviction for Use of a

---

[3] 21 U.S.C. § 843(b).

Communication Facility to Facilitate a Drug Offense -- a communication offense -- constituted a "felony drug offense," and that therefore he was subject to the statutory mandatory minimum period of incarceration of twenty years set forth in 21 U.S.C. § 841(b)(1)(A).

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS ERRONEOUSLY AFFIRMED THE TRIAL COURT'S DECISION THAT PETITIONER'S PRIOR CONVICTION FOR USE OF A COMMUNICATION FACILITY TO FACILITATE A DRUG OFFENSE CONSTITUTED A "FELONY DRUG OFFENSE."

Title 21, United States Code Section 841(b)(1)(A) provides in relevant part, that "[i]f any person commits [a violation of 21 U.S.C. § 841(a)] after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment. . . ." The trial court ruled, and the Court of Appeals affirmed, that Petitioner's 1987 conviction for Use of a Communication Facility to Facilitate a Drug Offense, prohibited by Title 21, United States Code Section 843(b), was a "felony drug offense," and it imposed a term of imprisonment of twenty years. Petitioner submits that this was error.

This issue is apparently one of first impression since the Court of Appeals opinion is void of any legal precedent supporting its decision. Although the telephone conversation that formed the factual basis of the 1987 conviction related to drug activity, the conduct itself that is prohibited involved the use of a "communications facility," namely a telephone. Therefore this offense cannot fairly be said to be a "felony drug offense."

In the case of United States v. Price, the United States Court of Appeals for the District of Columbia Circuit noted that for sentencing enhancement purposes there is a distinction between a conspiracy and the underlying criminal act that is the subject matter of the conspiracy. 990 F.2d 1367 (D.C. Cir. 1993). Price involved a career offender enhancement. The court stated that "a conspiracy to commit a crime involves quite different elements

from whatever substantive crime the defendants conspired to commit; it requires only the meeting of the conspirators minds, plus an overt act that need not itself be in any way criminal." See Charles C. Torcia, 4 Warden's Criminal Law §§ 726-28 (14th ed. 1981).

In the instant case the communication offense for which Petitioner was charged, prosecuted and convicted involves very different elements from the substantive crimes addressed as felony drug convictions and targeted for enhancement purposes. Although Price addressed these types of distinctions in a slightly different context (career offender enhancement instead of prior felony drug offense enhancement), the holding is nevertheless analogous to this situation. Therefore the offense that Petitioner was convicted of in 1987 was not a proper basis for application of the mandatory minimum sentence proscribed by Section 841(b)(1)(A).

II. EVIDENCE OF PETITIONER'S PRIOR CONVICTION FOR USE OF A COMMUNICATION FACILITY TO FACILITATE A DRUG OFFENSE WAS ADMITTED IN ERROR AND DENIED PETITIONER A CONSTITUTIONALLY FAIR TRIAL.

As was discussed in the Statement of Relevant Facts, the trial court permitted, over the objections of Petitioner's trial counsel, testimony about Petitioner's prior conviction. In fact, the testimony that was elicited by the prosecutor was not even accurate. The actual exchange that occurred between the prosecutor and the witness was:

Q: Did you know that Tony had a prior conviction that he was on probation for?

A: Yes, I did.

Q: And what was that prior conviction?

A: Heroin.

Trial Transcript, Vol. II, pp. 28-29. In fact, the conviction was for Use of a Communication Facility to Facilitate a Drug Offense, prohibited by Title 21, United States Code Section 843(b), **not** for heroin possession, production, use or sale. Although the prosecutor claimed to the Court of Appeals that he corrected the witness' misstatement, he merely explained that the offense was "heroin-related." Trial Transcript, Vol. II, p. 29.

The prosecutor asserted to the trial court, and again to the Court of Appeals, that this testimony was proper impeachment since the witness had stated that he did not know or believe that Petitioner was dealing drugs. Even assuming arguendo that this use would not violate Rule 403, Federal Rules of Evidence, this impeachment is improper because the witness testified only that he didn't think Petitioner was **dealing** drugs, not that the Petitioner had never had any **involvement** with drugs.

Furthermore, under the Federal Rules of Evidence the testimony was not relevant. Fed. R. Evid. 401. "Relevant evidence" is that evidence which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." Id. Evidence of the fact that Petitioner was previously convicted of the offense in question did nothing to aid the jury in determining the ultimate issue – guilt or innocence in the present case. All that could be hoped for was that the jury would believe that a person who has been convicted of a past crime would be more likely to have committed the present crime they are standing trial for. This, however, is a clearly improper purpose. Fed. R. Evid. 404.

Finally, even if a genuine argument could be made that the evidence was relevant, the primary reason that the introduction of this evidence was in error, however, is because any probative

value of the evidence was substantially outweighed by the danger of unfair prejudice. Fed. R. Evid. 403.

In short, the evidence should never have been heard by the jury. The Court of Appeals' holding that "[a]ny prejudice that arose when the jury heard this testimony was cured by the Court's subsequent instruction" is an erroneous belief that the jury is capable of engaging in "a mental gymnastic which is beyond, not only their powers, but anybody's else." Nash v. United States, 54 F.2d 1006, 1007 (2nd Cir. 1932).

III. THE PROSECUTOR'S REPEATED MIS-CHARACTERIZATION OF EVIDENCE WAS MISCONDUCT WHICH DEPRIVED PETITIONER OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

During his closing argument, the prosecutor made several assertions about facts that were not in evidence. Although Petitioner's trial counsel made timely objections on the record, the objections were overruled. Three examples of these statements are as follows:

> MR. PAULSEN [THE PROSECUTOR]: . . . Tony El Hani, the testimony showed, was getting ounces, ounces of heroin for something less than $5,000 –[4]

> MR. STRAUSS [DEFENSE COUNSEL]: Objection, Your Honor,

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[4] The transcript actually read "Tony El Hani's testimony showed, was getting ounces, ounces of heroin for something less than $5,000 –" This is erroneous, however, as there is no doubt that Petitioner did not testify.

misstatement of the evidence. There was no such evidence in this case.

THE COURT: Well, I am going to overrule the objections. And members of the Jury, the reason I am, is because this is final argument. If your recollection of the facts is different from anything you hear from the lawyers in their summation or final argument, it is your recollection that counts and you should apply that to your determination. As I say, this is the attempt on the counsel's part to give you their ideas of what the facts are and what it proves. So you keep that in mind as you go through listening to these arguments. Go ahead, Mr. Paulsen.

* * *

MR. PAULSEN: . . . The cabin where you found the scale, the seal-a-meal with all the traces of heroin on it and a lot of packaging equipment up there, too.

MR. STRAUSS: Your Honor, I would object as mischaracterization of facts. There wasn't a lot of traces of heroin on anything –

THE COURT: Well, I'm going to overrule the objection. And I repeat the caution I gave you. It is your version of

the facts that controls, Members of the Jury and you keep that in mind as you hear these arguments.

* * *

MR. PAULSEN: . . . He was the one Joe Lopez talked about being at Tony El Hani's residence when Tony El Hani's had just received a shipment of a pound of heroin -- a pound at one time from some courier coming in from Detroit with heroin sewn in the lining of her boots, and it was Tony El Hani not Raffoul El Hani --

MR. STRAUSS: Objection, Your Honor, mischaracterization of the evidence and I would like to approach the bench, please.

THE COURT: All right. Approach the bench.

(At the Bench)

MR. STRAUSS: Your Honor, this is improper closing. There is simply no such evidence about a pound of cocaine coming in from Detroit. It is the third time that counsel has totally and intentionally misrepresented the facts. My client now is deprived of a fair trial because of this prosecutorial misconduct. Number one, I would

move for a mistrial. Alternatively, I would ask the Court to instruct counsel for the government to stick to the facts and make reasonable inferences. The only thing about Detroit was, Lopez said, "I remember something about a woman coming from Detroit."

He never mentioned a pound of cocaine -- of heroin, excuse me. And it just -- this entire argument is full of facts the government is making up here.

THE COURT: Well, I am going to deny your motion for a mistrial and I am going to suggest that possibly, Mr. Paulsen, that you do keep very close to the evidence that has been introduced. I am not going to make a determination, or not whether the jury could infer from the evidence that they have heard that a pound of heroin came in, in the boot of a woman from Detroit. I think, frankly, that would be a logical inference that they can make, but I think that you ought to be careful in where you state it. But I will overrule it and I will give the jury another cautionary instruction.

MR. STRAUSS: I would like that, Your Honor, and it is my belief at this juncture that this conduct now amounts to prosecutorial misconduct of the worst kind.

> THE COURT: I understand your view and I am going to overrule that motion is that is what you are making.

Trial Transcript, Vol. II, pp. 45-46, 59-51.

These mischaracterizations of critical facts that had not been introduced as evidence is without question the use of extrinsic evidence outside of the trial record. As such the prosecutor's actions constitute misconduct which prejudicially affected the substantial rights of Petitioner. United States v. Walther, 867 F.2d 1334, 1341 (11th Cir.), cert. denied, 493 U.S. 848, 110 S. Ct. 144, 107 L. Ed. 2d 103, and cert. denied, 493 U.S. 978, 110 S. Ct. 506, 107 L. Ed. 2d 508 (1989). Appellate courts have held that even a "single misstep" on the part of the prosecutor can be so destructive of the right to a fair trial that reversal is mandated. Pierce v. United States, 86 F.2d 949 (6th Cir. 1936).

The fact that the United States government was a party to this litigation makes the prosecutor's misconduct much more significant that it would have been in a civil case. As the United States Court of Appeals for the Eleventh Circuit has noted:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all. . . . It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. **Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to**

carry much weight against the accused when they should properly carry none.

United States v. Eyster, 948 F.2d 1196 (11th Cir. 1991) (emphasis added); see also United States v. Young, 470 U.S. 1, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985) (vouching may jeopardize the defendant's right to be tried solely on the evidence presented to the jury).

Given the several instances of what certainly amount to more than mere "missteps," reversal and remand for a new trial is necessary to insure Petitioner's constitutional rights.

IV. THE UNITED STATES SENTENCING GUIDELINES WERE IMPROPERLY APPLIED TO PETITIONER BECAUSE THE COURT CALCULATED THE BASE OFFENSE LEVEL CONSIDERING NOT JUST THE QUANTITY OF DRUGS THAT PETITIONER HAD BEEN ALLEGED TO HAVE SOLD, BUT ALSO THE QUANTITY OF DRUGS ALLEGED TO HAVE BEEN SOLD BY HIS CODEFENDANTS.

The mere fact that Petitioner's codefendants had been proven to have distributed a certain quantity of drugs does not per se permit the trial court to sentence Petitioner based on that quantity. Conduct may not be factored into a defendant's base offense level "where it is established that [it] was neither within the scope of the defendant's agreement, nor was reasonably foreseeable in connection with the criminal activity the defendant agreed to jointly undertake." United States v. Carmody, F. Supp. 917 (M. D. Ala. 1990); see also United States v. North, 900 F.2d 131 (8th Cir. 1990); United States v. Rivera, 898 F.2d 442 (5th Cir. 1990). Relevant conduct includes only conduct in furtherance of the conspiracy known to or reasonably foreseeable by the defendant. United States v. Clavis, 956 F.2d 1079 (11th Cir. 1992).

The government must do more than allege a particular defendant has entered some aspect of the conspiracy in order for the defendant to be criminally liable for the entire amount of drugs distributed during the course of the conspiracy. United States v. Townsend, 924 F.2d 1385, 1390 (7th Cir. 1991). The underlying principle behind this is that conspiracy liability may not exceed the scope of a defendant's agreement to further criminal activity. Id.

Based on the matters proven at trial, the government did not prove that Petitioner had entered into an agreement with his codefendants for profit. Therefore under the reasonable foreseeability standard he should not be held liable for the drugs that his codefendants distributed.

CONCLUSION

For all of the foregoing reasons this Honorable Court should grant certiorari and remand this matter for retrial so that Petitioner may be granted a constitutionally fair trial.

Dated: January 3, 1995.

Respectfully submitted,

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Decision of the Court of Appeals A-1

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 93-2603

United States of America, *
*
Plaintiff-Appellee, *
v. *
*
*
Nafez Anthony Karam, *
also known as Tony Karam, *
*
Defendant-Appellant. *

No. 93-2604

United States of America, *
*
Plaintiff-Appellee, * Appeals from the United
v. * States District Court for the
* District of Minnesota.
*
George Antoun Haro, *
*
Defendant-Appellant. *

No. 93-3297

United States of America, *
*
Plaintiff-Appellee, *
v. *
*
Antoine Youssef El-Hani, *
also known as Tony El Hani, *
*
Defendant-Appellant. *

Submitted: May 12, 1994

Filed: October 7, 1994

Before BOWMAN, Circuit Judge, HEANEY, Senior Circuit Judge, and HANSEN, Circuit Judge.

HANSEN, Circuit Judge.

Antoine Youssef El Hani ("Tony El Hani") was convicted by a jury of aiding and abetting the distribution of heroin in violation of 21 U.S.C § 841 (a) (1) and conspiracy to distribute heroin in violation of 21 U.S.C. § 846. George Antoun Haro ("Haro") was convicted by a jury of distribution of heroin in violation of 21 U.S.C. § 841 (a) (1) and conspiracy to distribute heroin in violation of 21 U.S.C. § 846. Nafez Anthony Karam ("Tony Karam") pleaded guilty to one count of possession with intent to distribute heroin and to one count of possession with intent to distribute cocaine, both in violation of 21 U.S.C. § 841 (a) (1). The appellants appeal from their convictions and sentences. We affirm the judgments of the district court.[1]

I. BACKGROUND

Viewing the evidence in the light most favorable to the verdicts, a reasonable jury would have been justified in finding the following:

The appellants were members of a heroin distribution ring in the Minneapolis-St. Paul ("Twin Cities"), Minnesota, area. Tony El Hani, the chief operator of the ring, obtained large quantities of heroin to be distributed in the Twin Cities area. Raffoul El Hani, Tony El Hani's brother, was in charge of the day-to-day operations of the heroin ring until he fled the country shortly before he was indicted. Raffoul El Hani set up a local network of distributors who stored the heroin at stash houses and later delivered it to regular El Hani customers.

[1] The Honorable David S. Doty, United States District Judge for the District of Minnesota.

The El Hanis paid the distributors a commission of $100-300 for each seven-gram (1/4 ounce) baggie of heroin they distributed.

One of these distributors was appellant George Haro. Haro confessed to law enforcement officers that Raffoul El Hani enlisted his services as a distributor for the organization. Under his arrangement with the El Hanis, Haro would sell heroin packages to El Hani customers and deliver the money to the El Hanis, who in turn paid him a $100 commission for each seven-gram package he sold. His profits as a six-month distributor for the El Hanis totaled approximately $14,000. At the time of his arrest, Haro possessed $1,400 in cash.

Haro was introduced to Mary Gaona, who was already a regular El Hani heroin customer. Gaona subsequently became a frequent purchaser from Haro. Gaona in turn enlisted the assistance of various "helpers" who distributed the heroin to local drug users. These "helpers" included Jason Johnson and Paul Bender.

Gaona implicated Tony El Hani as the key player in the distribution ring. After she was arrested, Gaona informed police that she acquired heroin on a daily basis from El Hani distributors, including Haro. Gaona told authorities that she originally met Tony El Hani at a party and shortly thereafter began purchasing cocaine from him. Tony El Hani also introduced her to another source named "Jerry," with whom she made other drug acquisitions.

Tony Karam was also a distributor for the El Hani organization. Karam's customers included Gaona. Karam's criminal activities were uncovered when Paul Bender was arrested for selling heroin to a federal agent in a controlled buy. Bender cooperated with law enforcement officers and told them that he was distributing the heroin for Gaona and that one of her sources was a Lebanese male named "Tony." Bender said he sometimes met "Tony" at the Sun Ray Shopping Center to pick up heroin for delivery to Gaona.

Officers arrested Karam after a controlled buy with Bender. Karam told authorities he was recruited by Raffoul El Hani to work for the El Hani organization as a distributor. Evidence was also introduced at trial that on one occasion Karam acquired heroin from Raffoul El Hani and was told to make the check payable to Tony El Hani.

In addition to procuring heroin for local distribution, Tony El Hani supervised the storage of heroin at various "safe houses." Among these "safe houses" he used were his own residence and a cabin in his girlfriend's name. When agents searched both premises, they discovered various items of drug dealing paraphernalia containing traces of heroin.

Tony El Hani conducted several heroin transactions himself. He sold heroin to Joseph Lopez on several occasions and also to a relative named Rick George. He made payments in heroin (instead of cash) to Neil Rodrique for construction work. Tony El Hani became intensely involved in the day-to-day operations of the network after Raffoul El Hani left the country for Lebanon in 1992. When Tony El Hani was arrested, he possessed approximately $3,000 in cash.

On March 3, 1993, the government filed a seven-count superseding indictment in the District of Minnesota against Tony El Hani, Raffoul El Hani, Tony Karam, George Haro, Mary Gaona, and Jason Johnson. Tony El Hani was charged with aiding and abetting the distribution of heroin and conspiracy to distribute heroin. Karam was charged with possession with intent to distribute heroin, possession with intent to distribute cocaine and conspiracy to distribute heroin. The remaining defendants were charged with distribution of heroin along with conspiracy to distribute heroin.

Karam pleaded guilty to the two possession with intent to distribute charges. He was sentenced to 72 months of imprisonment after the district court granted the government's combined U.S.S.G. § 5K1.1 and Title 18 U.S.C. § 3553(e) motion for a downward departure. Tony El Hani and Haro

went to trial and were convicted by the jury. Haro was found guilty of distribution of heroin and conspiracy to distribute heroin and was sentenced to two concurrent terms of 78 months. Tony El Hani was convicted of aiding and abetting the distribution of heroin and conspiracy to distribute heroin and sentenced to 240 months. All three appeal.

II. DISCUSSION

A. Karam

Karam challenges only his sentence. In a plea agreement, Karam and the government agreed that Karam's base-offense level was 26, that he was entitled to a three-level reduction for acceptance of responsibility, that the government would move for a downward departure below the ten-year statutory mandatory minimum[2] and recommend a sentence of 72 months of imprisonment, and that the remaining conspiracy charge would be dismissed.

Paragraphs 40 and 41 of the presentence report ("PSR") indicated that Karam should be held responsible for an additional 280 grams of heroin that he distributed during the conspiracy which increased the base-offense level two levels to 28. With the three level reduction for acceptance of responsibility, an adjusted offense level of 25 was proposed by the presentence investigator. The district court found the adjusted offense level to be 25 and Karam's criminal history category to be III. The district court observed that the identified guideline range was 70-87 months, but that there was an overriding 120-month statutory minimum. The court then granted the government's substantial assistance motion,

[2] The mandatory minimum ten-year sentence contained in 21 U.S.C. 841 (b) (1) (B) is applicable to count II of the indictment against Karam because of the quantity of heroin to which Karam admitted in his plea agreement and the fact that he has a prior felony drug conviction.

departed below the statutory minimum, and imposed a sentence of 72 months, which is the sentence the parties agreed would be recommended by the government.

Karam argues that the district court erred in determining his sentence by considering drug quantities in the dismissed count of the indictment. He claims that absent the erroneously considered quantity of drugs, his adjusted offense level would be level 23 (instead of level 25) with a range of 57-71 months. However, the defendant was indisputably subject to the statutory mandatory minimum of ten years contained in 21 U.S.C. § 841(b)(1)(B). That statute trumped any guideline determination based on quantity. Karam received a substantial downward departure below the otherwise applicable statutory mandatory minimum sentence. The extent of such a departure is unreviewable on appeal. See United States v. Albers, 961 F.2d 710, 712 (8th Cir. 1992).

Karam's argument suffers from an even more fundamental defect. He made no objection to the presentence report's counting of the additional 280 grams of heroin. When asked by the district judge at the sentencing hearing, "Is there anything else you would like to say at all about that [PSI] report or anything else you would like to say at all about what is going to happen here this morning, either on behalf of your client or otherwise about the sentencing guidelines, whatever?", Karam's counsel replied, "* * * there is nothing with regards to the presentence investigation report that I would comment upon. That is an excellent report." (Karam Sentencing Tr. at 2) (emphasis added). When the court made its findings of fact it stated: "There being no objections to the factual statements contained in the presentence investigation report, the court does adopt those statements as its findings of fact." (Id. at 8). In the probation officer's addendum to the presentence report dated May 25, 1993, he reported to the court in advance of the sentencing hearing that "In a telephone conversation on May 24, 1993, counsel for the defendant

indicated that he had no objections or proposed amendments to the presentence investigation report." Having failed to object to the PSR's quantity determination either before or at the sentencing hearing, Karam cannot be heard to complain now, absent plain error which is not present here. United States v. Kenyon, 7 F.3d 783, 786 (8th Cir. 1993).

Even if Karam's departure sentence was reviewable, we have explicitly held that a sentencing court may consider, as relevant conduct under U.S.S.G. § 1B1.3, the conduct charged in dismissed counts. United States v. Sheahan, No. 93-3914 (8th Cir. 1994); United States v. Streeter, 907 F.2d 781, 791 (8th Cir. 1990). See also United States v. Galloway, 976 F.2d 404, 425 (8th Cir. 1992) (en banc) (sentencing court may consider conduct not contained in count of conviction for purposes of relevant conduct in imposing sentence).[3] Karam further argues that the plea agreement specifically contemplated that his initial offense level would be level 26. Karam fails to recognize, however, that the plea agreement specifically provided that he would be sentenced under the Sentencing Guidelines and the application of those Guidelines rests within the sole discretion of the district court. (Karam Addend. at 4, 6). The base-offense level noted in the plea agreement only governs the parties' agreed-to position with regard to sentencing; the agreement explicitly states that it is not binding on the court. We conclude that the court

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[3] Karam asks us to adopt the rationale applied by a panel of the Ninth Circuit in United States v. Restrepo, 883 F.2d 781 (9th Cir. 1989). We decline to do so not only because it is contrary to our en banc case law but also because the Restrepo panel opinion relied on by the defendant was later vacated by the panel itself, see United States v. Restrepo, 896 F.2d 1228 (9th Cir. 1990), the panel issued a subsequent opinion which is contrary to the defendant's position, see United States v. Restrepo, 903 F.2d 648 (9th Cir. 1990), and the Ninth Circuit en banc affirmed the second panel opinion. See United States v. Restrepo, 946 F.2d 654 (9th Cir. 1991), cert. denied, 112 S. Ct. 1564 (1992).

committed no error in applying the Guidelines by considering conduct from the dismissed conspiracy count in determining Karam's sentence, and that his sentence should be affirmed.

B. Haro

Haro raises three issues on appeal. First, he argues that the indictment was impermissibly duplicitous. Second, he contends that the district court erred in calculating the drug quantity attributable to him. Finally, he asserts that the district court erroneously denied him a reduction for acceptance of responsibility.

1. Multiple Crimes in Count IV of Indictment

Haro contends that count IV of the superseding indictment was duplicitous because it charged more than one crime in a single count. Count IV charged Haro with distributing in excess of 100 grams of heroin from on or about January 1, 1992, through June 30, 1992.[4] The government alleged that Haro distributed seven grams of heroin a day, seven days a week, for approximately twenty weeks. As a result of the alleged duplicity, Haro requested dismissal of the indictment or, in the alternative, providing the jury with a special verdict form. The government argues that it

[4] Specifically, count IV of the superseding indictment states:

> From on or about January 1, 1992, through on or about June 30, 1992, in the State and District of Minnesota, the defendant,
>
> GEORGE ANTOUN HARO,
>
> knowingly and intentionally distributed in excess of 100 grams of a mixture or substance containing a detectable amount of heroin, a controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

consolidated Haro's drug transactions into a single count to avoid the confusion and unwieldiness that would attend setting out individual counts in the indictment for each of the roughly 140 transactions it alleged Haro made.

The principal vice of a duplicitous indictment is that the jury may convict a defendant without unanimous agreement on the defendant's guilt with respect to a particular offense. United States v. Saleh, 875 F.2d 535, 537 (6th Cir. 1989). In the present case, assuming arguendo that Count IV of the indictment is duplicitous, we believe that the district court's instructions to the jury cured the duplicity. The district court instructed the jury that it "must unanimously agree upon at least one particular distribution that the defendant is alleged to have made." (Trial Tr., Vol. III at 127.) The jury was also instructed that "[i]f you cannot agree in that manner you must find the defendant not guilty of the offense charged in Count 4 of the indictment." (Id.) Courts have held that the risk of a nonunanimous verdict inherent in a duplicitous count may be cured when the jury is given a limiting instruction that requires it to unanimously find the defendant guilty with respect to at least one distinct act. See, e.g., United States v. Holley, 942 F.2d 916, 926-29 (5th Cir. 1991), cert. denied, 114 S. Ct. 77 (1993); United States v. North, 910 F.2d 843, 876-78 (D.C. Cir. 1990) (per curiam), cert. denied, 500 U.S. 941 (1991); United States v. Peterson, 768 F.2d 64, 67 (2d Cir.), cert. denied, 474 U.S. 923 (1985). We find the rationale of these cases persuasive and adopt it as our own.

In the present case, the district court gave such a limiting instruction. The jury was instructed that it had to unanimously conclude that Haro made at least one particular transaction before it could find him guilty of the charge in Count IV of the indictment. We assume, as we must, that the jury followed these instructions. See Francis v. Franklin, 471 U.S. 307, 324 n.9 (1985). Any duplicity in Count IV of the indictment was cured by the court's limiting instruction.

2. Sentencing Issues

Haro next argues that the district court erred in calculating the drug quantity attributable to him and in denying him a reduction for acceptance of responsibility. The district court based its drug quantity calculation on the testimony of codefendant Jason Johnson. Johnson testified that he and codefendant Mary Gaona picked up seven grams of heroin on a daily basis from Haro for approximately twenty weeks. Based on this testimony, the district court determined that the appropriate quantity of heroin attributable to Haro to be 980 grams.

A district court's drug quantity determination will not be overturned unless clearly erroneous, and its findings as to the credibility of a witness in making that determination are virtually unreviewable on appeal. United States v. Adipietro, 983 F.2d 1468, 1472 (8th Cir. 1993) (quotes and citations omitted). The district court's determination regarding drug quantity was not clearly erroneous, and we decline to review its assessment concerning the credibility of Jason Johnson, a person it had the opportunity at trial to observe closely.

Haro also contends that he is entitled to an acceptance of responsibility reduction under U.S.S.G. § 3E1.1. The district court concluded that this was not one of the rare situations described in U.S.S.G. § 3E1.1, comment. (n.2) when the reduction is appropriate for a defendant who has gone to trial. The district court also declined to grant the reduction on the basis that Haro "refused to discuss his criminal conduct with the probation officer, an indication that he does not fully accept responsibility for his action." (Haro Addend. at A-5).

We review a district court's findings of fact with respect to a denial of a motion for an acceptance of responsibility reduction under the clearly erroneous standard. United States v. Miller, 951 F.2d 163, 164 (8th Cir. 1991). The acceptance

of responsibility reduction is generally "not intended to apply to a defendant who puts the government to its burden of proof at trial. . . . U.S.S.G. § 3E1.1, comment. (n.2).

In the present case, Haro put the government to its proof by going to trial. We agree with the district court's assessment that this is not one of the rare cases described in § 3E1.1, comment. (n.2), and conclude that the district court did not commit any error in denying Haro an acceptance of responsibility reduction.

C. El Hani

Tony El Hani raises six issues on appeal. He argues that: (1) the government produced insufficient evidence to convict him of aiding and abetting the distribution of heroin as well as conspiracy to distribute heroin; (2) the district court erred in denying his motion to sever his trial from co-defendant Haro's trial; (3) the district court erred in admitting character evidence against him; (4) the district court erred in allowing evidence of his prior conviction; (5) the government committed prosecutorial misconduct in closing argument; and (6) the district court committed various errors in conjunction with his sentence. We address each of these arguments in turn.

1. Sufficiency of the Evidence

Tony El Hani contends that insufficient evidence exists to sustain his convictions for aiding and abetting the distribution of heroin and conspiracy to distribute heroin. In addressing this claim, we examine the evidence in the light most favorable to the government, giving it the benefit of all reasonable inferences and we may reverse only if we can conclude that a reasonable factfinder could not have found El Hani's guilt

beyond a reasonable doubt. United States v. Zerba, 21 F.3d 250, 251-52 (8th Cir. 1994).

The government presented overwhelming evidence of Tony El Hani's guilt on both the aiding and abetting and conspiracy counts. Without fully repeating all of the facts outlined above, El Hani was the leader of an organization that obtained and distributed large quantities of heroin in the Twin Cities area. He maintained several safe houses for the storage of the heroin. He personally distributed quantities of heroin to Neil Rodrique and Rick George. Finally, after his brother Raffoul left the country, Tony El Hani took over the day-to-day operations of the distribution ring. Viewing the evidence in the light most favorable to the government, we conclude that overwhelming evidence exists in the record to sustain El Hani's convictions on both the aiding and abetting count as well as the conspiracy count.

2. Severance

Tony El Hani asserts that the district court erred in denying his motion to sever his trial because of the admission at trial of the confession of codefendant Haro, which El Hani argues violated Bruton v. United States, 391 U.S. 123 (1968). The Supreme Court's holding in Bruton prohibits the admission of an out-of-court confession by a nontestifying codefendant implicating another defendant by name in the crime. Id. at 126. In the present case, Officer Tom Billings of the Minneapolis Police Department testified that Haro confessed that Raffoul El Hani recruited him to sell heroin. Tony El Hani was not mentioned. Therefore, the Bruton standard was not violated with regard to the admission of Haro's confession.

Officer Billings admitted, under cross-examination by El Hani, that Karam had mentioned Tony El Hani by name when Karam made a confession to law enforcement officers.

However, the Bruton standard is inapplicable when the confessing witness testifies and is available for cross-examination. United States v. Coco, 926 F.2d 759, 761 (8th Cir. 1991). Here the Bruton rule does not apply because Karam was the next witness to testify and El Hani in fact cross-examined him. Moreover, Tony El Hani elicited the alleged Bruton statements during cross-examination of Officer Billings. Bruton is not violated when the defendant elicits the incriminating out-of-court statements. See United States v. Reyes-Alvarado, 963 F.2d 1184, 1187 (9th Cir. 1992) ("a defendant who elicits a statement that may be violative of Bruton may not later claim error based on the admission of that statement").

3. Character Evidence

Tony El Hani contends that the district court erred in allowing certain testimony by Neil Rodrique that constituted inadmissible character evidence pursuant to Federal Rule of Evidence 404(b). Rodrique testified that Tony El Hani paid him with heroin in exchange for certain construction work that he did. Rodrique also testified that El Hani had been in drug rehabilitation.

Rodrique's testimony concerning the heroin payment relates to conduct that is charged in the instant indictment and, therefore, is not 404(b) evidence. See United States v. Stephenson, 924 F.2d 753, 763 (8th Cir.), cert. denied, 112 S. Ct. 63 (1991) (rule 404(b) inapplicable when disputed evidence relevant to the charged crime itself). The testimony that El Hani had been in drug rehabilitation was objected to, stricken from the record, and the district court gave a curative instruction which required the jury to disregard the evidence. We assume the jury followed the court's curative instructions and disregarded the evidence. See Parker v. Randolph, 442 U.S. 62, 73 (1979). Any prejudice that arose when the jury

heard this testimony was cured by the court's subsequent instruction.

4. Admission of El Hani's Prior Drug Conviction

Tony El Hani next argues that the district court erred in allowing testimony concerning a prior drug conviction. The government called Rick George to testify about several heroin transactions with El Hani. On cross-examination, El Hani's counsel elicited from George that George did not know whether El Hani dealt drugs or not but did know that El Hani was meeting with his "PO" (probation officer) every week. Prior to redirect examination, the prosecutor requested to inquire whether George knew that El Hani had been convicted of a heroin offense. The district court ruled that the defendant had "opened the door" and allowed the government to make the requested inquiry. On redirect, the prosecutor asked George the identity of the "PO," as well as El Hani's purpose for meeting with him. George responded that the "PO" was El Hani's probation officer and the reason El Hani was meeting with him was because of a prior heroin conviction.

Assuming without deciding that this testimony was erroneously admitted, we believe that its admission was harmless error. United States v. DeAngelo, 13 F.3d 1228, 1233 (8th Cir. 1994). This testimony was brief and no further reference was made to El Hani's conviction for the remainder of the trial. Moreover, the other evidence against El Hani was overwhelming. Any error by the district judge in allowing this evidence was harmless and therefore does not provide a basis for reversing El Hani's conviction.

5. Prosecutor's Statements During Closing Argument

Tony El Hani complains that the prosecutor committed prosecutorial misconduct by misstating the record several

times during closing arguments and consequently put evidence before the jury that was not in the record. The court reporter's transcript shows the following:

> Mr. Paulsen (Prosecutor): * * * Tony El Hani's testimony showed, was getting ounces, ounces of heroin for something less than $5,000--
>
> Mr. Strauss (Defense Counsel): Objection Your Honor, misstatement of the evidence. There was no such evidence in this case."

(Trial Tr., Vol. III at 45). The government claims in its brief that because Tony El Hani did not testify in the case the transcript is in error and that the statement the prosecutor actually made was: "Tony El Hani, the testimony showed, was getting ounces, ounces of heroin, for something less than $5,000---." Whatever the statement was, the district court overruled the objection and told the jury that its recollection of the evidence would control. When the prosecutor resumed his argument, his immediate statements made clear that he was not relying on nonexistent testimony but rather on the testimony of one Joe Lopez. El Hani later took issue with the prosecutor's statement that during the search of El Hani's cabin, a Seal-A-Meal machine was seized with "all the traces of heroin on it." (Trial Tr., Vol. III at 49). Finally, El Hani objected to several references the prosecutor made that El Hani had received pound quantities of heroin. (Trial Tr., Vol. III at 49-51).

In evaluating allegations of prosecutorial misconduct alleging improper statements during closing argument, this court asks: (1) whether the prosecutor's comments were improper; and (2) if so, did such remarks prejudicially affect the defendant's substantial rights in obtaining a fair trial. United States v. Johnson, 968 F.2d 768, 770 (8th Cir. 1992). Prosecutors, however, are entitled to argue reasonable

inferences to be drawn from the facts in evidence during closing arguments. United States v. Boyce, 797 F.2d 691, 694 (8th Cir. 1986).

After carefully reviewing the record, we find no error. The first alleged misstatement (if in fact made) was corrected for the jury. Each of the remaining objected-to statements was a fair inference that could be drawn from the evidence and therefore was not improper. Moreover, the district court stated on the record, out of the presence of the jury, that the prosecutor probably was drawing a fair inference from the record concerning the statements with which El Hani took issue. (Trial Tr., Vol. III at 51). Further, the district court gave several cautionary instructions to the jury that it was their recollection of the evidence, not the lawyers' arguments, that should control their decisions concerning the evidence. Assuming the prosecutor did misquote the evidence, which we are not fully convinced to be the case, these instructions cured any prejudice. Therefore, El Hani's contention of prosecutorial misconduct fails.

6. Sentencing Issues

Finally, El Hani asserts that the district court made several errors in determining his mandatory minimum twenty-year sentence. El Hani first takes issue with the district court's determination that he had been convicted of the statutorily required prior felony involving drugs. Section 841(b)(1)(A) requires the imposition of a twenty-year mandatory minimum sentence upon any individual who is convicted of distributing in excess of one kilogram of heroin and who possesses "a prior conviction for a drug felony offense." 21 U.S.C. § 841(b)(1)(A) (1988). El Hani acknowledges his prior felony conviction under 21 U.S.C. § 843(b) for using a communication facility to facilitate the intentional and unlawful importation of controlled substances. However, he argues that his prior

conviction does not fall within the parameters of "a prior conviction for a drug felony offense" within the meaning of 841(b)(1)(A).

"Felony drug offense" is defined in § 841(b)(1)(A) as "an offense that is a felony under any provision of this subchapter. . . ." Id. Both El Hani's instant offense and his prior offense are found in the same Subchapter and Part of Title 21. Therefore, the plain language of § 841(b)(1)(A) requires imposition of the twentyyear mandatory minimum sentence for El Hani's current conviction under that section.

El Hani next contends that the district court erred in determining that the amount of heroin attributable to him exceeded one kilogram. We review the district court' s determination of drug quantity under the clearly erroneous standard. United States v. Olderbak, 961 F.2d 756, 763 (8th Cir.), cert. denied, 113 S. Ct. 422 (1992). Because one of the counts of the indictment charged Tony El Hani with conspiracy, he "may be held accountable for the conduct of others in furtherance of the conspiracy as long as it was reasonably foreseeable to [him]." U.S.S.G. § 1B1.3(a)(1)(B). Given the evidence introduced at trial, the district court's calculation concerning El Hani's drug quantity was not clearly erroneous.

Finally, El Hani argues that the district court erred in assessing a three-level increase under U.S.S.G § 3B1.1 for his role in the offense. The additional three levels increased his adjusted offense level from level 32 to level 35 with a resulting sentencing range of 210-262 months. However, El Hani was subject to the mandatory twenty-year minimum sentence contained in 21 U.S.C. § 841(b)(1)(A) because he had the prior felony drug conviction and was involved in more than a kilogram of heroin. He was sentenced to the mandatory minimum sentence. Consequently the role in the offense adjustment determination had no impact on his sentence and any error in that determination cannot be the basis of an

appeal. Our independent review convinces us however, that the adjustment was correctly applied.

IV. CONCLUSION

For the reasons enumerated above, we affirm the judgments of the district court as to each defendant.

A true copy.

Attest: /s/

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 93-3297

United States of America,	*	
	*	
Appellee,	*	
	*	Appeal from the United States
vs.	*	District Court for the
	*	District of Minnesota
Antoine Youssef El Hani,	*	
also known as Tony El Hani,	*	
	*	
Appellant.	*	

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration,, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

October 7, 1994

A true copy.

ATTEST: s/ Michael E. Gans

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT